No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED,
APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF OF THE UNITED STATES, APPELLANT

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1. *The question of whether any equities exist in favor of appellees justifying restoration of consid-*

eration is for Congress and not the courts. Appellees Taylor state (Br. 11) that "The record in this case reveals nothing as to the conduct of appellees Henry B. and Elizabeth A. Taylor inconsistent with the Court's Finding and Conclusion that a good cause does exist for the return of the money." Appellees in so stating ignore the primary findings of the court below, which they have not seen fit to challenge by appealing.

Included in those findings is the following:

> The evidence clearly, certainly and convincingly establishes the fact that defendants Taylor, and those acting in concert with them, were aware of the necessity for a publicly advertised sale unless the property were purchased by a bona fide Indian on his or her own behalf and account, and that in order to avoid such requirement, Ernestine C. Siniscal was by subterfuge presented as an acting purchaser, and the true identity of defendants Taylor as purchasers was concealed. (Fdg. IX, R. 58.)

In our statement of the case and in Point I of our brief as appellee on the appeal of Reed and Siniscal we have shown that this finding was fully supported by evidence, as were other findings of the court. And in Point I (pp. 24–27) of that brief, as well as point I of our brief as appellant (pp. 12–22), we have shown that the case is a duplicate of those dealt with in *United States* v. *Trinidad Coal Co.,* 137 U. S. 160 (1890) and *Causey* v. *United States,* 240 U. S. 399 (1915), and that under those decisions two propositions apply here: (1) The Government is entitled to a

decree of cancellation and (2) it is not necessary that the Government restore the consideration to the Taylors.

Appellees (Br. 28) attempt to dismiss those cases, with others relied on by the Government, as inapplicable because of a claimed different "factual situation" and at Brief 16–21 they undertake to make out a case of extenuating circumstances in their favor. But we submit that these cases cannot be thus disposed of. They make plain that what appellees are trying to have this Court do is the very thing rejected in those cases. As stated in the *Trinidad* case (137 U. S. at pp. 170–171):

> * * * If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, *we must assume that Congress will make an appropriation for that purpose when it becomes necessary to do so.* * * * [Italics supplied.]

And later in the *Causey* case, the Supreme Court stated (240 U. S. p. 402):

> * * * That rule [that the money must be restored], if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained *and abide the judgment of Congress as to whether the consideration paid shall be refunded.* * * * [Italics supplied.]

The Supreme Court thus stated very plainly that the courts in cases of this kind do not undertake to

determine whether in a given case there are any equities in favor of a wrongdoer justifying a return of the consideration, and that such is a question for Congress alone. As pointed out in our brief as appellant (p. 19), in *Pan-American Petroleum Co.* v. *United States,* 9 F. 2d 761 (C. A. 9, 1926), this Court reversed a trial court in an identical situation. In doing so it did not go into the question of whether, as the trial court had concluded, any equities were established by the evidence, as appellees would have the Court do in this case. This court simply cited and quoted from the *Trinidad* and *Causey* cases, *supra,* and *Heckman* v. *United States* 224 U. S. 413 (1912), and held in effect that the question of equities was foreclosed to the trial court.

This brings us to appellees' treatment of the *Heckman case.* At Brief 27 they regard the *Heckman* decision as holding that if the Indians whose lands the Government there sought to recover had been present as parties, the Government would have been denied relief unless the consideration was restored, and they assert that the Indians were parties in this case because they appeared as witnesses at the trial.

In the first place, appellees cite no authority for the proposition that all witnesses at a trial *ipso facto* become parties to an action, and it is palpably unsound. Thus, appellees' hypothesis fails. But beyond that, it is clear from a reading of that portion of the *Heckman* decision quoted by appellees (Br. 25–26) that the case does not support the absurd proposition that the rights of the Government can be nulli-

fied by the mere device of adding the Indians as parties. When the *Heckman* case arose it had already been settled in the *Trinidad* case that the Government was entitled to prevail without restoration of consideration, and the court's opinion in *Heckman* does not show that it was even urged that the Government's right to cancel depended on restoration of consideration. What *was* urged was that the Indians "should be made parties in order that equitable restoration may be enforced," it being suggested that the Indians might have property unaffected with a governmental interest which could be reached by judgment, *against the Indians, of course.* But the Supreme Court stated that no such case was presented there and that, in such a case, "on a proper showing as to any of the transactions that provision can be made for a return of the consideration, *consistently with the cancelation of the conveyances,*" the court could bring in as a party anyone whose presence for that purpose is found to be necessary (italics supplied). Thus, the court was squarely holding that, irrespective of any return of consideration, the conveyances had to be cancelled, and that return of consideration could be adjudged only against persons other than the Government.

Appellees (Br. 28) similarly distort the decision in *Hall* v. *United States,* 201 F. 2d 886 (C. A. 10, 1953). There Hall relied on *Heckman,* just as appellees seek to, but the court in effect stated that return of consideration had no bearing on the Government's right to cancel, and that the question could not be considered

except as against the Indian, who had not been made a party.[1]

We submit that, on the foregoing authorities, the question of whether equities exist entitling the Taylors to any favorable treatment by way of return of consideration is not for the courts but for Congress alone, and that the court below erred in considering the question.

2. *The district court's "finding" that good cause exists for a return of the consideration to the Taylors does not aid appellees.* Appellees, perforce, rely heavily (Br. 21–24) on the purported "finding" of the court below that good cause exists for a return of the consideration (Fig. XII, R. 59), and seek to lay upon the Government the burden of showing that the finding is "clearly erroneous." But, as the cases hereinbefore cited show, the court below erred in entertaining this question at all and the "finding" necessarily falls.

However, even if the question were one for the courts to pass upon, the so-called "finding" that good cause exists in this case cannot have the effect attributed to it by appellees. "Good cause" is clearly not a fact in itself but a conclusion which must find support in facts found by the court. We pointed this out in our opening brief (fn. 8, p. 21), and we think it is confirmed by appellees' statement (Br. 14)

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[1] It may be noted that the decisions in the *Heckman* and *Hall* cases necessarily establish the proposition that the Indians are not made parties by reason of the Government's having sued to protect its interests, and that they must be specially brought in in order to make them such.

that "'good cause' as a fact belongs in the same category with 'fraud,' 'negligence,' and other legal terms *that really are the summary of various independent facts.*" [Italics supplied.]

We agree with the coupling of "good cause" with "fraud" and "negligence," and we also agree that they must be arrived at from the "various independent facts" as found by the court. *Dalehite* v. *United States,* 346 U. S. 15 (1953) was a case brought against the Government under the Tort Claims Act. The court there was confronted with findings of the trial court of "causal negligence", which had been characterized by the court of appeals as "profuse, prolific and sweeping." The Supreme Court held that, even accepting such findings, no case was made within the Tort Claims Act. Notwithstanding, the court took occasion to issue a warning to district courts (a warning of which the lower court in this case did not, of course, have the benefit when it decided this case). Of the "findings" of negligence the court stated (346 U. S., p. 24, fn. 8):

> * * * Fed. Rules Civ. Proc., Rule 52 (a), in terms, contemplates a system of findings which are *"of fact"* and which are concise. The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. *Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied.* [Italics supplied.]

Accepting appellees' concession that "good cause" and "negligence" are comparable in the light of the law, it is apparent that in the *Dalehite* case the Supreme Court dealt the death blow to appellees' reliance on the trial court's "finding" of good cause and on Rule 52 (a), F. R. C. P.

Moreover, the "preliminary and basic facts" to which the Supreme Court alluded were found in this case by the court below. Appellees, not having appealed, do not challenge them. Instead, they state (Br. 22):

> As a matter of fact, the Findings are not contradictory. The Court, apparently, concluded that the constructive fraud which it made the basis for recission was not of such a nature or so attributable to Appellees Taylor as to justify withholding from such appellees the money they had paid under the circumstances.

We agree that the court below, for some reason, thought the Taylors should have their money back. But no basis for that view is to be found in the factual findings that the court did make. These findings were exhaustive and covered every phase of the case (see our opening brief, pp. 5–9). It is utterly impossible to find in these findings any preliminary or basic facts which would tend to support the trial court's "finding" of good cause, and appellees make no attempt to do so on the basis of the findings.

3. *Appellees' "FACTUAL BASIS FOR GOOD CAUSE" (Br. 16) does not establish that good cause*

exists for the return to the Taylors of the consideration paid. Even if the evidence could be examined on this question, appellees' purported "Factual Basis for good cause" (Br. 16–21) contains nothing that in any way supports their contention that they are entitled to be reimbursed. Appellees ignore the trial court's findings that the Taylors understood the law, sought to evade it, and employed Siniscal as a mere conduit or straw to accomplish that end (Fdgs. VII–IX, R. 58).

Appellees first point out (Br. 16–17) that their first contact with this transaction was on August 3, 1951, and that by that time the land had already been appraised by Gray at $135,000.00 and consents to sale had been obtained from the Indians. But these events are irrelevant to the findings of the court below that the Taylors had actual ("constructive" would suffice) notice of the law requiring a public sale at competitive bidding unless the sale were to an Indian, and that they deliberately employed Siniscal as an Indian for a fee to pose as a purchaser, the Taylors putting up the money, the Taylors securing the execution of the deed to them by Siniscal in advance (see Government brief as appellee on appeal of Reed and Siniscal, p. 19).[2]

[2] In the Government's brief as appellee on the appeal of Reed and Siniscal, pp. 3–5, fn. 25, pp. 26–27, it is demonstrated that (1) the appraisal of Gray was a sham, (2) that it was illegal, and (3) that in any event it did not permit a sale to Taylor without competitive bidding. And the Taylors' agreement to pay Siniscal $25,000.00 for her services shows that they well knew it. Their insistence on $300,000.00 as the option price to Brenner and Marsh also shows they knew the appraisal was way low. The consents to sale by Grant and Thornton are unimportant in this case.

Similarly the fact that the Taylors never met Pryse (Br. 17), has no tendency to absolve the Taylors of those findings.

Appellees' reference to the check having borne the notation "Purchased by Ben Taylor" as showing the Taylors were not concealing their identity or the source of the money is interesting, but it confirms the fact that they were the real purchasers and using Siniscal as a screen. (See R. 887.)

At Brief 18–19, reference is made by appellees to Exhibit 14, Original, and the statement therein that the Application For Removal of Restrictions on Siniscal was coincident with the approval of the Order Transferring Inherited Interests, as apprising the office in Washington "of exactly what had been done." This is not true. It did not inform the Washington office of the fact that Siniscal was a mere tool employed by the Taylors to avoid the requirement of competitive bidding, or that a standard form had been mutilated as a step in the scheme. Moreover, it has no tendency to prove that the Taylors were not, as the court below found, well aware of the law and guilty of a scheme to acquire the property in fraud of that law.

At Brief 19–20 (par. h) and at Brief 20 (par. k) appellees make it appear that Pryse, the Area Director, testified he had the authority to sign the Order Transferring Inherited Interests and the Order Removing Restrictions. This again has no tendency to weaken the court's findings that the Taylors well knew the illegality of the project. Moreover, Pryse was not aware at the time he signed these orders that

the lands were General Allotment Act lands, title to which had been tampered with by mutilation of a federal form and, as the Court (Fdg. XI, R. 59) stated, Pryse would not have signed those orders "had he known the true facts." (Government's brief as appellee on the appeal of Reed and Siniscal, p. 18).

Similarly (Br. 20) appellees cite La France's testimony that he considered Section 202.04 (c) (2) of the Indian Affairs Manual (Ex. 41, Original) as authorizing the preparation of the Order Transferring Inherited Interests. This again has no tendency to change the status of the Taylors in this transaction.[3] Appellees state (Br. 20) that "at no juncture of this case has the inapplicability of these sections been demonstrated, and that the only basis for the contention of *ultra vires* is that Ernestine C. Siniscal, in making her application (Ex. 9, R. 172) exaggerated her financial worth." Appellees thus adopt the device of Siniscal and Reed in their brief

[3] Appellees quote from this section of the Indian Manual, but they do not quote enough. The section later provides for an Order Transferring Inherited Interests identified as "Exhibit No. 5 of the Appendix" to the manual. Exhibit No. 5 is a form substantially like Exhibit 22, R. 166, and has to do with acquisition for a tribe, title to be in the United States in trust. At pp. 15–18 of our brief as appellee on the appeal of Reed and Siniscal, we demonstrate that Exhibit 22 was not used by La France, was not appropriate to the transfer attempted here, and for like reasons section 202.04 (c) (2) and Exhibit 5 show no authority for La France's action. And of course appellees do not pursue La France's further testimony on this subject that the order used in this case had never before been used (R. 158–159, Fdg. III, R. 57), that Exhibit 21 (used in this case but altered) and Exhibit 22 did not fit the Order Removing Restrictions, that the change was made by him at Flinn's suggestion (R. 169–170), and his final admission that he considered Exhibit 21 suitable but changed it at Flinn's bidding (R. 761).

(p. 17) where they dispose of the *ultra vires* finding on the absurd pretense that the court below must have meant that Siniscal's act was *ultra vires*. That the Order Transferring Inherited Interests used in this case and the interdependent Order Removing Restrictions were unlawful and thus were *ultra vires* is fully demonstrated in Point II (pp. 27–31) of the Government's brief as appellee on the appeal of Reed and Siniscal.

Finally, appellees say (Br. 21) that "This is not a case where the money was paid to the Indians" and that the Taylors have not imposed upon the Indians because the Taylors never had met them! The fact that the money was paid to the Government's agents has, of course, no tendency to alter the fact that a fraud was perpetrated here. The statutory price was paid to the Government's agents in both the *Trinidad* and *Causey* cases, *supra*. Thus in the *Trinidad* case, 137 U. S. p. 170, the court speaks of the money paid as "moneys furnished to its [the Government's] agents in order to procure such patents." And this Court will have little difficulty in perceiving a flaw in appellees' theory that the Indians Grant and Thorton were not imposed upon by the Taylors because they had never met.

In summary, the unchallenged findings of the court below, amply sustained by the evidence, are that the Taylors, well knowing their ineligibility under the law to purchase the property except at a public, competitive sale, deliberately sought to evade the law by offering Siniscal $25,000.00 to pose as an Indian buying in her own right. They simply gambled on the

success of the project. The reason they took the gamble is apparent. The Taylors knew that the valuation at $135,000.00 was ridiculously low and that a tremendous profit was in prospect. Taylor inspected the timber on August 4 and at first agreed to let Brenner and Marsh have 50% of the profits (Taylor testimony, R. 892). But three days later he refused to go through with this arrangement, offered and finally gave them an option at $300,000.00, refusing an option at $260,000.00, and Taylor in his pretrial deposition, justifying his $300,000.00 demand, admitted he thought the property was worth that figure (R. 894). The Taylors are thus exposed as parties who, motivated by avarice, gambled on a transaction they knew to be illegal and lost, and there is no possible justification for any conclusion that they be made whole at the Government's expense.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment be reversed, insofar as it required the Government to sell this property and pay over any part of the proceeds to the Taylors.

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